

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ABDUL AZIZ,	:	CIVIL ACTION
Plaintiff,	:	
	:	NO. 97-5681
v.	:	
	:	
THE PENNSYLVANIA STATE	:	
UNIVERSITY,	:	
Defendant.	:	

**MEMORANDUM**

BUCKWALTER, J.

October 22, 1997

On October 15, 1997, the Court entered judgment for Defendant on Plaintiff's claims of discrimination on the basis of race, national origin, and age. (Aziz v. Pennsylvania State University, E.D. Pa. 97-1134). This complaint flows from the same cause of action: Defendant's failure to interview or hire Aziz for a teaching position at its Berks County campus. Plaintiff again claims discrimination on the basis of race and national origin, and he now alleges that Defendant was motivated by religious discrimination. Aziz attached to his complaint a copy of a "right to sue" letter from the Equal Employment Opportunity Commission ("EEOC") dated September 5, 1997, which names Penn State but does not specify its Berks County campus. He argues that the two complaints are based on two separate EEOC charges, one alleging age discrimination and the second alleging race and national origin discrimination (he does not mention his religion claim). He further claims to have the EEOC's sanction for litigating in this piecemeal fashion.

His argument is completely belied by the record of the two cases. His first complaint was not limited to age discrimination but also alleged claims for race, national origin and age discrimination. Aziz has already benefitted from the confusion generated by any EEOC delay in responding to his discrimination charges: in denying Defendant's Motion to Dismiss No. 97-1134 for failure to exhaust EEOC remedies, the Court accepted Aziz's explanation of bureaucratic gridlock and treated the claims as though exhausted. Aziz certainly acquiesced in this characterization, as he sought summary judgment against Penn State on his age, race and national origin claims. He cannot now return seeking another day in court on those same claims.

Res judicata bars a later action where there is : (a) a final judgment on the merits of an earlier action; (b) an identity of the cause of action in both the earlier and later suit; and (c) an identity of parties in the two suits. Defendant's motion to dismiss was filed before the entry of judgment in No. 97-1134, and it therefore did not raise res judicata against this new complaint. A federal court may raise it sua sponte, however, "in the interest of judicial economy where both actions were brought before the same court." Boone v. Kurtz, 617 F.2d 435, 436 (5th Cir. 1980); see also Bechtold v. City of Rosemount, 104 F.3d 1062, 1068 (8th Cir. 1997); Nixon v. United States, 978 F.2d 1269, 1297 (D.C. Cir. 1992) (Henderson, J., concurring). Res judicata attaches upon entry of the preclusive judgment, even if an appeal is pending, or if the time for taking an appeal has not expired. See, e.g., Williams v. Commissioner, 1 F.3d 502, 504 (7th Cir. 1993); National Post Office Mail Handlers v. American Postal Workers Union, 907 F.2d 190, 192 (D.C. Cir. 1990); Commercial Union Assur. Co. v. Pucci, 523 F. Supp. 1310, 1318 (W.D. Pa. 1981) cf., Bailey v. Ness, 733 F.2d 279 (3d Cir. 1984)(federal court should stay disposition of arguably barred claim, when appeal in preclusive state decision is pending). Aziz's race and

national origin claims were finally litigated in 97-1134, and he is precluded from relitigating those issues. He is further precluded from litigating his religious discrimination claim, which is based on the identical cause of action as 97-1134. Further, although it is unnecessary to resolve the question in order to dismiss this complaint, the Court notes that it is unclear whether Aziz did in fact obtain a second right-to-sue letter against Penn State's Berks County campus.

Recognizing that Aziz may appeal the judgment in 97-1134, the dismissal of this complaint will be without prejudice to Aziz bringing his claims should that judgment be reversed. See Lee v. Criterion Ins. Co., 659 F.Supp. 813, 819-20 (S.D.Georgia 1987). The Court would then determine whether to allow Aziz's religious discrimination claim.

An order follows.

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Defendant.	:	

**ORDER**

AND NOW, this 22nd day of October 1997, upon consideration of Defendant's Motion to Dismiss (Dkt. #2); Plaintiff's Response thereto (Dkt. #3); and Defendant's Reply (Dkt. # 4), it is hereby **ORDERED** that Defendant's motion is **GRANTED**, and the Complaint is **DISMISSED**, without prejudice.

BY THE COURT:

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RONALD L. BUCKWALTER, J.